SUPREME COURT OF THE UNITED STATES.

No. 250.

JOHN R. PARSONS, PLAINTIFF IN ERROR,

vs.

CHARLES S. HARVEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room in the city of Chicago, in said district, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Friday, the ninth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the eighty-ninth year.

WM. H. BRADLEY, *Clerk.*

JOHN R. PARSONS
vs.
CHARLES T. HARVEY. } In assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the third day of April, in the year of our Lord one thousand eight hundred and sixty-five, came John R. Parsons, plaintiff, by E. S. Smith, esq., his attorney, and filed
2 in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a writ of summons against Charles T. Harvey, defendant, and also, at the same time, filed his bond for costs in said entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

Circuit court, ——— term, A. D. 1865.

JOHN R. PARSONS, plaintiff,
vs.
CHARLES T. HARVEY, defendant. } Assumpsit. Damages, $4,000.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

You will please issue a summons in the above entitled cause, in favor of the above named plaintiff, who is citizen of the State of Illinois, against the above named defendant, who is citizen of the State of Michigan, and make the same returnable to said court on the day of , A. D. 1865.

Dated the 3d day April, A. D. 1865.

3 Yours, &c.,

E. S. SMITH, *Pl'ff's Att'ys.*

To Wm. H. Bradley, the clerk of sad court.

Endorsed: Filed this third day of April, A. D. 1865. Wm. H. Bradley, clerk.

REC 250—1

Bond.

Circuit court, ——— term, A. D. 1865.

JOHN R. PARSONS
vs.
CHARLES T. HARVEY. } In

UNITED STATES OF AMERICA:
Northern district of Illinois, ss:

I hereby enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 3d day of April, A. D. 1865.

E. S. SMITH.

Endorsed: Filed April 3d, A. D. 1865. Wm. H. Bradley, clerk.

4 On the same day, to wit, the third day of April, A. D. 1865, a writ of summons issued out of said clerk's office against said defendant, in said entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Charles T. Harvey, if he shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto John R. Parsons in a plea of trespass on the case upon promises, to his damage, as he alleges, of four thousand dollars; and have you then and there this writ.

Witness, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid,
5 this third day of April, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the 89th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50-cent revenue stamp.]

Return.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents, that I have appointed, and by these presents do appoint, Augustus B. Cotes my true and lawful deputy to execute the annexed writ, (John R. Parsons *vs.* Charles T. Harvey,) and to make true return thereon, according to law.

J. R. JONES, [SEAL.]
United States Marshal of the Northern District of Illinois.

I have this 3d day of April, A. D. 1865, executed the annexed writ, (John R. Parsons *vs.* Charles T. Harvey,) by reading the same to and in the presence and hearing of Charles T. Harvey, therein named.

J. R. JONES,
United States Marshal of the Northern District of Illinois.
By A. B. COTES,
Special Deputy.

Augustus B. Cotes, being first duly sworn, deposes and says, that he served the annexed writ, as stated in the foregoing re-
6 turn.

Sworn to before me this 6th day of April, A. D. 1865.
[SEAL.] P. A. HOYNE,
U. S. Com., N. D. Ill.

[5-ct. revenue stamp.]

Endorsed: Filed April 12th, A. D. 1865. Wm H. Bradley, clerk.

On this day, to wit, the 29th day of April, A. D. 1865, came said plaintiff, by his attorney, and filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

Circuit court of the United States for the 8th circuit and northern district of Illinois.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

The defendant, Charles T. Harvey, who is a citizen of the State of Michigan, was summoned to answer the plaintiff, John R. Parsons, who is a citizen of the State of Illinois, in a plea of trespass on the case upon promises; and, therefore, comes the said plaintiff, by his attorney, E. S. Smith, and complains of the said defendant, Charles T. Harvey, for that, whereas the said plaintiff, to wit, on the
7 15th day of July, 1861, sold and delivered to the said defendant, at his special instance and request, to wit, at Chicago, in the district aforesaid, for the price of nine hundred and seventy-five

dollars, a certain sawing machine, known and described as Fairbank's and Wilmanth's sawing machine; and in and by the terms of said contract of purchase, said defendant agreed to pay to said plaintiff the sum of one hundred and fifty dollars in money, on the day and date last aforesaid, and the balance of said purchase price, to wit, the sum of eight hundred and twenty-five dollars, to be paid, and the said defendant then and there, in consideration of the said sale and delivery of the said machine, as aforesaid, agreed to pay to the said plaintiff the said balance of eight hundred and twenty-five dollars, in Lake Superior pig iron, to be delivered in said Chicago, in the county of Cook aforesaid, during the season, (the season of navigation meaning,) for the year last aforesaid, at twenty-six dollars per ton; or, if not paid in iron that season, at the option of the seller, (the
8 said defendant meaning,) the purchase money aforesaid to be on interest from the first day of December, in the year last aforesaid, until lthe iron was delivered the then next spring, to wit, the spring of 1862.

By means whereof the said defendant, by his said contract with said plaintiff, did then and there become liable to said plaintiff, to pay said plaintiff the said balance, eight hundred and seventy-five dollars in Lake Superior pig iron, at twenty-six dollars per ton, delivered in Chicago.

And also, by means thereof, the said defendant, by his said contract, in case he did not deliver the said iron during the said season of 1861, or in the following spring, then the said defendant became liable, and was, by his said contract bound to deliver to said plaintiff a sufficient quantity of Lake Superior pig iron in Chicago, to make the amount of said balance, it being eight hundred and twenty-five dollars, with interest thereon from December 1st, 1861, whenever
9 he, the said defendant, should thereafter be requested so to do.

And the said plaintiff avers, that the said defendant, on the 3d day of April, 1865, and before the commencement of this suit, was requested by said plaintiff to deliver to said plaintiff in Chicago a sufficient quantity of Lake Superior pig iron to discharge the said balance unpaid, with interest thereon, at the rate of twenty-six dollars per ton, which balance, including interest, was eight hundred and forty-six dollars, which the said defendant refused to do.

And the said plaintiff further avers, that at the time of said demand and refusal, the said defendant became liable to deliver to said plaintiff thirty-two and seven-thirteenths tons of Lake Superior pig iron in the city of Chicago, and at that time, to wit, April 3d, 1865, said iron was worth seventy dollars per ton, and by his refusal said defendant became liable to pay to said plaintiff the value of thirty-two and seven-thirteenths tons of Lake Superior pig iron, at the city of Chicago, on that day, to wit, the 3d day of April, 1865, which
10 amounted to the sum of two thousand two hundred and seventy-seven and 62-100 dollars, which sum said plaintiff claims from said defendant.

By means whereof, and by force of the statute in such case made and provided, the said defendant, then and there, at Chicago, be-

came liable to pay to the said plaintiff the said sum of two thousand two hundred and seventy-seven and 62-100 dollars, according to the tenor and effect of his said contract, so made with said plaintiff, as hereinbefore stated, and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay the said plaintiff the said sum of two thousand two hundred and seventy-seven and 62-100 dollars.

And for that, whereas, also, the said defendant, heretofore, to wit, on the 15th day of July, 1861, at Chicago, to wit, at Chicago,
11 in the district aforesaid, was indebted to the said plaintiff in the further sum of one hundred and fifty dollars, and interest thereon from said last-mentioned date, according to the terms and conditions of the said contract, hereinbefore set forth and mentioned, between said plaintiff and said defendant, which said one hundred and fifty dollars was a part of the purchase price for said sawing machine, so sold and delivered to said defendant by said plaintiff, as aforesaid.

And said plaintiff further avers, that said defendant, being so indebted, he, said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and promised the said plaintiff to pay him the said sum of money, according to the tenor and effect of the said contract, when he, said plaintiff, should so request of said defendant. Yet, though often requested, the said defendant hath not paid said sum of money, or any part thereof, but wholly neglects and
12 refuses so to do.

And also, for that, whereas, the said defendant, heretofore, to wit, on the 15th day of July, in the year of our Lord one thousand eight hundred and sixty-one, at Chicago, to wit, at Chicago, in the district aforesaid, was indebted to the said plaintiff in the sum of four thousand dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to
13 wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had, before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay unto the said plaintiff so much money as the last aforesaid goods, wares, and merchandise,

dollars, a certain sawing machine, known and described as Fairbank's and Wilmanth's sawing machine; and in and by the terms of said contract of purchase, said defendant agreed to pay to said plaintiff the sum of one hundred and fifty dollars in money, on the day and date last aforesaid, and the balance of said purchase price, to wit, the sum of eight hundred and twenty-five dollars, to be paid, and the said defendant then and there, in consideration of the said sale and delivery of the said machine, as aforesaid, agreed to pay to the said plaintiff the said balance of eight hundred and twenty-five dollars, in Lake Superior pig iron, to be delivered in said Chicago, in the county of Cook aforesaid, during the season, (the season of navigation meaning,) for the year last aforesaid, at twenty-six dollars per ton; or, if not paid in iron that season, at the option of the seller, (the
8 said defendant meaning,) the purchase money aforesaid to be on interest from the first day of December, in the year last aforesaid, until lthe iron was delivered the then next spring, to wit, the spring of 1862.

By means whereof the said defendant, by his said contract with said plaintiff, did then and there become liable to said plaintiff, to pay said plaintiff the said balance, eight hundred and seventy-five dollars in Lake Superior pig iron, at twenty-six dollars per ton, delivered in Chicago.

And also, by means thereof, the said defendant, by his said contract, in case he did not deliver the said iron during the said season of 1861, or in the following spring, then the said defendant became liable, and was, by his said contract bound to deliver to said plaintiff a sufficient quantity of Lake Superior pig iron in Chicago, to make the amount of said balance, it being eight hundred and twenty-five dollars, with interest thereon from December 1st, 1861, whenever
9 he, the said defendant, should thereafter be requested so to do.

And the said plaintiff avers, that the said defendant, on the 3d day of April, 1865, and before the commencement of this suit, was requested by said plaintiff to deliver to said plaintiff in Chicago a sufficient quantity of Lake Superior pig iron to discharge the said balance unpaid, with interest thereon, at the rate of twenty-six dollars per ton, which balance, including interest, was eight hundred and forty-six dollars, which the said defendant refused to do.

And the said plaintiff further avers, that at the time of said demand and refusal, the said defendant became liable to deliver to said plaintiff thirty-two and seven-thirteenths tons of Lake Superior pig iron in the city of Chicago, and at that time, to wit, April 3d, 1865, said iron was worth seventy dollars per ton, and by his refusal said defendant became liable to pay to said plaintiff the value of thirty-two and seven-thirteenths tons of Lake Superior pig iron, at the city of Chicago, on that day, to wit, the 3d day of April, 1865, which
10 amounted to the sum of two thousand two hundred and seventy-seven and 62-100 dollars, which sum said plaintiff claims from said defendant.

By means whereof, and by force of the statute in such case made and provided, the said defendant, then and there, at Chicago, be-

came liable to pay to the said plaintiff the said sum of two thousand two hundred and seventy-seven and 62-100 dollars, according to the tenor and effect of his said contract, so made with said plaintiff, as hereinbefore stated, and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay the said plaintiff the said sum of two thousand two hundred and seventy-seven and 62-100 dollars.

And for that, whereas, also, the said defendant, heretofore, to wit, on the 15th day of July, 1861, at Chicago, to wit, at Chicago,
11 in the district aforesaid, was indebted to the said plaintiff in the further sum of one hundred and fifty dollars, and interest thereon from said last-mentioned date, according to the terms and conditions of the said contract, hereinbefore set forth and mentioned, between said plaintiff and said defendant, which said one hundred and fifty dollars was a part of the purchase price for said sawing machine, so sold and delivered to said defendant by said plaintiff, as aforesaid.

And said plaintiff further avers, that said defendant, being so indebted, he, said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and promised the said plaintiff to pay him the said sum of money, according to the tenor and effect of the said contract, when he, said plaintiff, should so request of said defendant. Yet, though often requested, the said defendant hath not paid said sum of money, or any part thereof, but wholly neglects and
12 refuses so to do.

And also, for that, whereas, the said defendant, heretofore, to wit, on the 15th day of July, in the year of our Lord one thousand eight hundred and sixty-one, at Chicago, to wit, at Chicago, in the district aforesaid, was indebted to the said plaintiff in the sum of four thousand dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to
13 wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had, before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay unto the said plaintiff so much money as the last aforesaid goods, wares, and merchandise,

at the time of the sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested; and the said plaintiff avers, that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of four thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid had notice.

14 And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of four thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of said defendant.

And for other money, by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of said defendant; and for other money by the said defendant before that time had, and received to, and for the use of the said plaintiff; and, also, in the further sum of four thousand dollars for so much money before that time, and then due and payable from the said defendant to the said plaintiff for interest upon, and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by the said plaintiff, forborne to the said defendant for divers long spaces of

15 time before then elapsed, at the like special instance and request of the said defendant; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the same day and year, and the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff, the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff, of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting, the said defendant, then and there was found to be in arrear and indebeted to the said plaintiff in the further sum of four thousand dollars of like lawful money, as afore-

16 said; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff, the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, (although often requested, etc.,) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof to the said plaintiff, the said

defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff, in the sum of four thousand dollars, and therefore the said plaintiff brings suit, etc.

E. S. SMITH,
Pl'ffs Att'y.

17 *Statement of amount of claim sued upon.*

At the date of the contract the amount of money to be paid, was	$150 00
Interest on this	33 18
	183 18
The amount paid in pig iron, in Chicago, was $825	$825 00
Paid by def't, in iron, prior to Dec. 1, '61	120 00
	705 00
Int. to April 3, '65	140 00
	846 00
To discharge the sum of $846 00, in iron, at $26 00 a ton, it will take 32 7-13 tons of iron, which iron was demanded and refused, and at that time worth $70 a ton, which at that rate will amount to	$2,277 62

Claim.

1st count	$2,277 62
2nd count	183 18
Am't due April 3, '65	$2,460 80

Endorsed: Filed April 29, 1865.

WM. H. BRADLEY, *Cl'k.*

18 On this day, to wit, the 3d day of May, A. D. 1865, came said defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

Circuit court, No. —, district of Illinois, May term, A. D. 1865.

CHARLES T. HARVEY
ats.
JOHN R. PARSONS.

UNITED STATES OF AMERICA:

And the said defendant, by Jas. L. Stark, jr., his attorney, comes and defends the wrong and injury, when, &c.; and saith that he did

not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, &c.

By his attorney,

JAS. L. STARK, JR.

And the said plaintiff doth the like.

E. S. SMITH, *Pl'ff's Att'y.*

And for a further plea in this behalf the said defendant, by leave of the court here, for this purpose first had and obtained,
19 says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff heretofore, to wit, in the June term of the superior court for the city of Chicago, A. D. 1863, impleaded the said defendant in a certain plea of trespass on the case on promises, for the not performing the same identical promises and undertakings, and each and every of them in the said declaration mentioned, and such proceedings were thereupon had in the said court on that plea, that afterwards, to wit, on the same June term, that said plaintiff, by the consideration and judgment of said court, recovered in the said plea against the said defendant the sum of eight hundred and nineteen 5-100 dollars for his damages, which he had sustained, as well on the occasion of not performing the same identical promises and undertakings in the said declaration mentioned, as for his costs and charges by him in his suit in that behalf expended, whereof the said defendant stands convicted; and thereupon, the said defendant
20 appealed said cause to the supreme court for the 3d grand division of Illinois, and such proceedings were had thereon that, at the April term, A. D. 1864, of said court, the said judgment was reversed, and said cause remanded to the said superior court, in which court the said cause is still pending, and which court has taken jurisdiction of said cause; and this the said defendant is ready to verify: Wherefore, he prays judgment if the said plaintiff ought to have, maintain, and prosecute his aforesaid action thereof against him.

By his attorney,

JAS. L. STARK, JR.

Endorsed: Filed May 3d, 1865. Wm. H. Bradley, cl'k.

On this day, to wit, the 8th day of June, in the adjourned May term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

JOHN R. PARSONS
vs. } Assumpsit.
CHARLES T. HARVEY.

21 Now comes the parties, by their attorneys, and the plaintiff, by his attorney, objecting to the plea in abatement filed

by the defendant, on the ground that the defendant had already pleaded the general issue, it is ordered by the court that said plea in abatement be withdrawn, and above issue joined:

Thereupon, comes a jury of good and lawful men, to wit: Benjamin F. Lawrence, Thomas Rhapp, W. C. Sanderson, John L. Smith, Charles F. Powell, Candius B. French, Edward Kipp, Samuel S. Kaysbeer, John Bates, T. B. Botsford, D. H. Hammer, and John Batton, who were all duly elected, tried, and sworn, well and truly to try said issue; and, after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arived, the further trial of the cause is postponed untill to-morrow morning.

On the next day, to wit, the 9th day of June, A. D. 1865, in said term of said court, in the record of the proceedings thereof in
22 said entitled cause is the following entry, to wit:

JOHN R. PARSONS
vs.
CHARLES T. HARVEY. } Assumpsit.

Now come again the parties, by their attorneys; and now come, also, the jury in this behalf empannelled and sworn; and, after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury returned into court the following verdict, to wit:

We, the jury, find the issue for the plaintiff, and assess his damages to the sum of ten hundred and thirty-eight dollars and thirty-five cents.

It is, thereupon, considered and adjudged by the court that the said plaintiff do have and recover of and from the said defendant the said sum of ten hundred and thirty-eight dollars and thirty-five cents, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended,
23 amounting to the sum of fifty dollars and eighty-five cents, and that he have execution therefore.

On the hearing of said cause the following exceptions were taken and allowed:

Bill of exceptions.

United States of America, circuit court of the United States, for the northern district of Illinois.—May term, 1865.

JOHN R. PARSONS
vs.
CHARLES T. HARVEY. } Assumpsit.

Afterwards, to wit, at a circuit court of the United States, held at the court room of the United States, in the city of Chicago, in the county of Cook and State of Illinois, and in the northern district of Illinois, on the first Monday, and first day of May, in the year of our

Lord eighteen hundred and sixty-five, before David Davis, esquire, circuit judge, and Thomas Drummond, esquire, asociate judge, appointed to hold the said circuit court according to the form of
24 the statute in such case made and provided, the aforesaid issue so joined, between the said parties as aforesaid, came on to be tried by a jury of the aforesaid northern district of Illinois, for that purpose duly empannelled, good and lawful men of said district, at which day, in said May term, to wit, on the eighth day of June, in the year last aforesaid came them, as well the said plaintiff as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid empannelled to try the said issue, being called also, come, and were then and there in due manner chosen, and sworn to try the same issue. And upon the trial of that issue the counsel for the plaintiff to maintain and prove the said issue on his part gave, offered, and read in evidence an instrument of which the following is a copy:

"CHICAGO, *July* 15, 1861.

"CHAS. T. HARVEY:

Bo't of J. R. PARSONS,

"1 Fairbank & Wilmarth sawing machine, d'lv'd on board at
25 Chicago, for $9,75. A guarantee to be in all respects as good as a new machine and in perfect order. Terms of payment, cash 150; balance payable in Lake Superior pig iron, d'lv'd in Chicago during this season, at $26 per ton, or if not paid in iron this season, at option of seller, the purchase money to be on interest from Dec. 1st until iron is d'lv'd next spring. The machine to be tried before 1st of September, and can be returned to seller within that time by forfeiture of the cash payment, and no further claim will exist, if machine prove unsatisfactory.

"J. R. PARSONS."

And the said plaintiff, by his said counsel, to further maintain and prove the said issue on his part by Egbert Jameson, proved that before the commencement of this suit, and on the third day of April, in the year of our Lord eighteen hundred and sixty-five, he, the said Jameson, for and on behalf of the said plaintiff, in the city of
26 Chicago, in the county of Cook and State of Illinois, demanded of the said defendant, Charles T. Harvey, under the abovementioned contract so much Lake Superior pig iron as would pay the sum of eight hundred and twenty-five dollars, at twenty-six dollars per ton. And that the said defendant then and there refused to deliver said iron.

And the said plaintiff, also, further proved by Edwin Thorn that Lake Superior pig iron, in the city of Chicago aforesaid, was worth in the market seventy dollars per ton on the third day of April, in the year of our Lord eighteen hundred and sixty-five, and that on the thirty-first day of May, 1862, such iron was worth in the city and market aforesaid the sum of thirty dollars per ton. And that such iron was then, the eighth day of June, 1865, in the city and market aforesaid worth the sum of fifty dollars per ton.

And the said plaintiff was, also, on the trial of the said issue,
27 sworn as a witness on his own behalf, and testified that the cash payment of one hundred and fifty dollars mentioned in the above-mentioned and recited contract had never been paid, nor any part thereof, and that the machine mentioned in said contract was purchased by him of one John A. McCulloch, who then had possession thereof, and delivered the same to him, the plaintiff, and that he shortly thereafter sold and delivered said machine to the defendant as mentioned in the said contract, and that the defendant had never at any time offered to return the said machine to him, the plaintiff, and that he, the plaintiff, when he bought said machine from said McCulloch, he had no knowledge or information that R. F. Vaughan or any one else other than said McCulloch had, or pretended to have any right, title or interest of, in, or to the said machine,
28 and that he paid the said McCulloch therefor before he heard that said Vaughan claimed a right to, or interest in the same.

And the said plaintiff, by his said counsel, further to prove and maintain the said issue on his part, offered and read in evidence the deposition of John A. McCulloch, and which deposition was and is in the words and figures following, to wit:

Deposition of John A. McCullough..

Deposition of John A. McCullough and R. F. Vaughn, witnesses of lawful age, produced, sworn, and examined before me, John J. McKinnon, in pursuance of the stipulation hereunto annexed, and to be used and read as therein agreed:

Int. 1st. What is your name, age, and place of residence; also, your occupation?

Answer. My name is John A. McCollough; 31 years old; Chicago; I am doing business for Mr. Boyer.

Int. 2. Do you know the parties to this suit; and if so, how long have you known them respectively?

29 Ans. Yes, I have known Mr. Parsons about five years, and Mr. Harvey about two to three years.

Int. 3. Do you know anything about the selling of a sawing machine, engine, and boiler, &c., by Parsons to Harvey, in 1861?

Ans. I do.

Int. 4. Do you know what were the terms and conditions of said sale from Mr. Parsons to Mr. Harvey?

(This question objected to by def't's counsel, because the contract referred to was in writing.)

Ans. Well, I heard them made; yes, sir.

Int. 5. Look at the paper writing now shown you, marked exhibit "A," and attached to this deposition, and state whether or not it contains the agreement between Mr. Parsons and Mr. Harvey for said machine?

30 Ans. It does, with the exception of the words therein "as good as new." The contract was modified afterwards, leaving those words out.

(Answer objected to by def't's counsel.)

6. Was there anything said by Mr. Parsons to Mr. Harvey, at the time of the selling of this machine, in reference to the fact as to whether the machine was new or had been used?

Ans. Well, Mr. Parsons objected to that clause in it, as the machine had been used, and Mr. Harvey says yes, or words that effect; that the natural ware was to be excepted. That is the substance of what he said. He said he knew it had been used.

(Obj. by def't's counsel.)

7th. Had Mr. Harvey seen this machine before he purchased it?

Ans. Yes, sir.

8th. Was the price specified in exhibit "A;" the price agreed upon by Parsons and Harvey for said machine?

Ans. It was; yes, sir.

31 9th. Do you know whether or not Mr. Harvey paid Mr. Parsons the cash item of $150, mentioned in exhibit A?

Ans. I don't know.

10th. Do you know whether or not this machine was shiped by Mr. Parsons, and rec'd by Mr. Harvey?

Ans. Yes, sir; it was.

11th. Do you know how Parsons came by this machine?

Ans. Yes, sir; I sold it to him.

12th. Did you own the machine at the time you sold it to Mr. Parsons?

Ans. I did.

13. State whether or not the machine was in good repair at the time it was shipped?

Ans. Yes, sir; I considered it so.

32 Cross-examination:

Cr. qs. 1st. Of whom, where, and when did you purchase this machine; how much did you agree to pay for it, and have you paid for it?

Ans. I bought it of Mr. Vaughan, at Chicago, some two years ago; I think it was in the fall of 1860. I agreed to pay $850 for it; I paid $250 at the time, and gave notes for the balance. I have since paid about $175 to $200 on the notes.

Cr. qs. 2nd. Did you sell the machine to Mr. Harvey? By this I mean, did you make the trade, and how long had you used it?

Ans. I had a talk with Mr. Harvey; I did not make the trade with him. I took Mr. Harvey up to Mr. Parsons at his request, as he did not know him. I had used the machine some six or eight weeks.

Cr. int. 3d. Did you not fix the terms of sale before Mr. Harvey saw Mr. Parsons?

33 Ans. No, sir; we did not.

Cr. int. 4th. What did you say to him the machine cost?

Ans. I told him the price of the machine was from $950 to $1,000.

Cr. int. 5. Where was the machine when you sold it to Mr. Parsons, and where was Mr. Parsons?

Ans. The machine was up to a lumber yard on the west side of the river, in Chicago, near 12th st. Mr. Parsons was here in Chicago; and I think we were coming down town together.

Cr. int. 6. What did Mr. Parsons pay you for the machine? When and how did he pay you for it?

Ans. He paid me $825; he paid me. I had money from him along the winter and fall previous, at different times. He paid me in money.

Cr. int. 7. How much were you owing him when you sold him the machine, and how much has he paid you since?

34 Ans. I don't know as I could tell exactly. I have had money from him along for the last three years.

Cr. int. 8. According to the best of your remembrance, how much did you owe him at the time you sold him the machine?

Ans. I could not tell. It is my impression, however, that it was between $600 and $700.

Cr. int. 9th. Did you give him a bill of sale of the machine at the time you sold it to him, or have you since?

Ans. I gave him one at the time we settled, which was at the time of sale, or soon after.

Cr. int. 10. When did you settle with Mr. Parsons, as referred to in your last answer?

Ans. Well, I don't remember when it was, so far as the machine is concerned. The price and amount I was to receive for the machine was fixed at the time. The price of the machine was placed to my credit.

Cr. int. 11th. Were you both in the street at time you sold the machine?

35 Ans. Well, I could not say as to that, my impression is that we were in front of his office or coming down town.

Cr. int. 12. In the event that Mr. Parsons does not recover in this case, are you not to refund to him what you have received?

Ans. No sir, not a cent.

Cr. int. 13. For whom were you acting in showing the machine at the time, on the day the trade was made between Parsons and Harvey?

Ans. I was acting at Mr. Harveys' request; he came round and asked me to take him up there, which I did.

Cr. int. 14. Did Mr. Parsons request you to show the machine, or khow that you were going to do so untill you introduced Mr. Harvey to him, at the time that paper writing "A" was made?

Ans. Yes, sir; I think he did.

Cr. int. 15. Then in showing the machine to Mr. Harvey you were acting for Mr. Parsons in what you did?

36 Ans. Whatever I done in selling that machine to Mr. Harvey after I sold it, I done for Mr. Parsons' benefit, and not mine.

Cr. int. 16. How long prior to July 15, 1861, was it that you sold the machine to Mr. Harvey?

Ans. Well, sir, I could not state definitely as to that; I did not pay any attention to it.

Cr. int. 17. Was the modification of the contract which you testify to in your direct examination, and in ans. to 5 interrogatory, made

before or after the bill or paper writing "A" was signed and delivered?

Ans. It was made before he signed it.

Direct resumed:

Int. 14. Do you know whether or not this machine was shipped by Parsons to Harvey, as agreed between them?

(Obj. to by deft. counsel.)

Ans. Yes, sir, it was.

37 Int. 15. What was the condition of this machine when Parsons shipped it?

Ans. In good running order.

Int. 16. Had this machine been used between the time when Harvey saw it and the time it was shipped?

Ans. Well, not much. It might, but I don't remember it; not much, if any.

Int. 17. State whether or not this machine was in as good order when it was shipped as when Harvey saw it?

(Obj. to by deft's counsel.)

Ans. I have stated it was better, that would be saying a good deal, that I had overhauled it and fixed it wherever defects was. I made some couplings and fixed the hose, by cutting out where places were bad and putting in new couplings.

Int. 18. Do you know whether or not, Parsons demanded or requested of Harvey, that he, Harvey, should furnish the iron mentioned in exhibit "A" during the season of 1861? State what

38 you know about it.

(Objected to by deft's counsel.)

Ans. Yes, sir, he did. All I know about it is, that he made a demand for the iron.

Int. 19. How do you know that fact?

Ans. Well, I know that he wrote him, and I mailed the letter for him.

Int. 20. You have stated, in answer to the first cross-interrogatory, that you bought this machine of R. F. Vaughan; was your purchase from him conditional or unconditional?

Ans. Unconditional.

Int. 21. Where were you and Mr. Vaughan at the time you made the purchase from him?

Ans. Mr. Vaughan and I went to Indiana together to buy the machine, I agreeing to pay the transportation there and return, in case I did not purchase. We were there a day or two trying it, and

39 returned by the Michigan Central train at night. There was nothing said about the purchase of the machine untill after we eft the depot at Chicago, that I remember of; on our way down town he told me that he would sell the machine for $850, which was less th an the usual price, but he wanted one working near the city that he could refer other parties to, and before we reached Lake st. we agreed on the terms of payment, which was $250 down, two notes of $300 each, payable in five and seven months, I think from date, I think.

that is my recollection. The next morning I went to Barrett King and Co's, drew the notes and got the money and went down to Sanford and Halls and paid Mr. Vaughan. It was about 9 or ten in the morning, and there was no talk of Mr. Vaughans holding any lien on the machine, either directly or indirectly.

Int. 22. State whether or not the terms and conditions of this sale and purchase, between Vaughan and yourself, were fully agreed upon the evening you returned from Indianna, and before you went
40 to Sanford and Halls next day to pay him the money and notes?

(Objected to by def'ts counsel.)

Ans. Yes, sir, they were.

Cross-examination resumed:

Cr. int. 18. Did you hear Mr. Parsons personally demand the iron of Mr. Harvey during the year 1861?

Ans. I ain't clear about that. I heard them talking at Barrett King and Co's., in the fall of 1861; I think it was along in Sept. or October. What there was said about the iron I don't remember distinctly; they were talking about the iron.

JOHN A. McCULLOCH.

41 Here the plaintiff rested: and the said defendant, by his said counsel, to maintain and prove the said issue on his part, offered and read in evidence the depositions of R. F. Vaughan and Edwin D. Hall, and which said depositions are in the words and figures following, to wit:

Deposition of R. F. Vaughan.

Deposition of Richard F. Vaughan, taken on the 17th day of May, A. D., 1865, before Edwin Coye, notary public, at Rochester, N. Y., on behalf of the defendant.

Interrogatories referred to in the foregoing notice, and to be answered by Richard F. Vaughan, witness to be produced, sworn, and examined, under and by virtue of the annexed commission, before ——— ———, esq., or any judge or justice of the peace of the county and State last mentioned in the notice, in the cause therein mentioned and referred to, and now pending in the circuit court of the United States, wherein John R. Parsons is plaintiff, and Charles T. Harvey is defendant, on the part and behalf of said defendant, as follows, to wit:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to the first interrogatory. My name is Richard F.
42 Vaughan; my age is 55 years; my residence is the city of Rochester, N. Y.

Interrogatory second. Do you know the parties to this suit, or either, and which of them, and how long have you known them respectively?

Answer to interrogatory second. I know the parties to this suit, both of them; I have been acquainted with both of them about four years last past.

Interrogatory third. Did you ever see or know anything about a "Fairbank's & Wilmarth's sawing machine," sold by the plaintiff to the defendant in the month of July, 1861? If yea, state when and where you first saw it, what you know of it, and where you last saw it.

Answer to interrogatory third. I have seen and know about a Fairbank's & Wilmot sawing machine, so called by the plaintiff to the defendant in July, 1861; I built said machine, or rather it was built or manufactured for me; I last year saw it at Lake Superior, Mich., in the possession of Charles T. Harvey, the defendant.

Interrogatory fourth. If you shall state that you once owned
43 it, state to whom, and on what terms you parted with it, and where you next saw the machine after you parted with it.

Answer to interrogatory fourth. I once owned said machine, and sold it to John A. McCulloch for eight hundred and fifty dollars. He paid me two hundred and fifty dollars cash down on the delivery of the machine, and for the ballance of $600 due me, I took John A. McCulloch's two notes, with the understanding, that if the notes were not paid when due, the machine should be sold to pay the amount and interest. It was further understood and agreed by and between us, that the machine should not be McCulloch's untill the notes were paid, and that either of us should have the priveledge of selling the machine at any time after maturity of the notes to pay them in case of default.

Interrogatory fifth. If you shall state that you saw it, the next time you saw it after you parted with it in the possession of the
44 defendant, in Marquett county, Michigan, state for what purpose you went to see it.

Answer to interrogatory fifth. The next time I saw the machine was in Marquette county, Michigan. It was in the possession of the defendant, Charles T. Harvey. I went there for the purpose of putting the machine in order, and for the purpose of collecting and receving the amount, $600, due me upon it.

Interrogatory sixth. If you shall have stated that you claimed to be owner of the machine, state why you claimed it, and whether you demanded it of the defendant.

Answer to interrogatory sixth. I claimed it or the pay for it, or rather the amount due me under the arrangement or agreement between McCulloch and myself; I did not go there for the purpose of taking the machine away, but rather to collect the amount due me upon it. When McCulloch sold the machine I expected to receive the pay for it, that is, the amount of my notes.

45 Interrogatory seventh. State the condition of the machine when you saw it, and how much it would take to make it as good as new, and *and* put it in perfect order.

Answer to interrogatory seventh. When I saw the machine it needed repairs; I think that, at the time, the machine could have

been put in good repair, for all practical purposes, for one hundred and fifty dollars.

Interrogatory eighth. State whether J. R. Parsons, the plaintiff, drew an order for one hundred and twenty dollars on the defendant, in part payment for said machine.

Answer to interrogatory eighth. J. R. Parsons, the plaintiff, did draw an order for one hundred and twenty dollars on Mr. Harvey, the defendant, in part payment for the sawing machine.

Interrogatory ninth. Do you know any other matter relative to the case? If yea, state the same.

Answer to interrogatory ninth. I do not think of any other
46 matter or thing relative to the case that would be beneficial to either party.

R. F. VAUGHAN.

The deposition of Edwin L. Hall, of the city of Chicago, county of Cook, and State of Illinois, of lawful age, produced, sworn, and examined, upon his corporal oath, on the seventeenth day of April, 1863, at my office in the city of Chicago, to be read in evidence in a certain suit and matter in controversy now pending and undetermined in the superior court of Chicago, in the State of Illinois, wherein John R. Parsons is the plaintiff, and Charles T. Harvey is the defendant, on behalf of the defendant.

The said Edwin L. Hall, being by me, duly sworn to testify the truth, as well on the part of the plaintiff as defendant, in relation to the matters in controversy between the said plaintiff and defendant, as far as he should be interrogated, testified and deposed as follows:

Deposition of Edwin N. Hall.

1st interrogatory. What is your name, age, occupation, and where do you reside?

47 Answer. Edwin L. Hall; am 32 years of age; occupation, transportation agent, and reside in Chicago.

2d int. Do you know the parties to this sait; and did you ever see or know anything about the Fairbank's and Wilmarth's sawing machine, the price of which is here in controversy.

Answer. I do know them, I have seen it.

3d. int. Was you present in Sept., 1860, when a contract was made between R. F. Vaughan and John A. McCulloch, in relation to said machine? If so, state where it was, at what time, and state the contract.

(Objected to by pl'ff's attorney, on the ground that the question is leading. 2d. Because it inquires of transactions between parties other than the parties to this suit, and which took place before the sale by the pl'ff in the suit.)

Answer. I was it was at our office, (the office of Sandford & Hall,) in the fall of 1860, I cannot recollect the month. The contract was about a sawing machine, which was then in Indianna. Mr.
48 Culloch had been testing the machine; Mr. McCulloch was to

pay two hundred and fifty dollars in cash, which said sum was then paid, and he also gave two notes, the amounts of which I do not remember, nor the time they were to run. No bill of sale was given at that time. No security was given for the payment of those notes, except that in case he, McCulloch, should be unable to meet the payment of said notes, he was to deliver said machine to Mr. Vaughan in as good condition as it was at that time, natural ware excepted.

Cross-examination by pl'ff's att'y.

1st c. int. Was this contract in writing?

Answer. It was not.

2d c. int. Was there anything said between McCulloch and Vaughan in regard to Vaughan's refunding to McCulloch any of the $250, which McCulloch paid in cash, or any part of the money that he might pay on the notes, in case the machine should be redelivered to Vaughan.

Answer. I heard nothing said about that between Vaughan and McCulloch.

49 3d c. int. Do you know whether anything was ever paid on these notes?

Answer. I have seen this morning an indorsement of $150 on the notes, in two sums, one of $120, Oct. 2nd, 1861, and $30 in February, 1861.

4th c. int. Do you know whether, under this contract, this machine was ever delivered to McCulloch by Vaughan?

Answer. It was then in McCulloch's possession. No formal delivery was ever made to my knowledge.

EDWIN L. HALL.

Subscribed and sworn to, before me, this 17th of April, 1863.

S. M. DUNNING,
Notary Public.

The above deposition is taken by the agreement of parties, and may be read on trial of the cause, subject to all legal objections to its competency.

JAS. L. STARK, Jr.,
Att'y for Def't.
E. L. SMITH,
Att'y for Pl'ff.
By B. D. McGRUDER.

April, 17, 1863.

STATE OF ILLINOIS,
Cook County, City of Chicago:

I, Seth M. Dunning, a notary public, in and for the city of
50 Chicago, in the county of Cook and State aforesaid, do hereby certify that Edwin L. Hall, whose name is subscribed to the foregoing deposition, was by me, as such notary public, sworn as a

witness in this suit, between the said plaintiff and defendant, that he would testify the truth so far as he should be interrogated concerning the same; that the said deposition was taken at my office in the city of Chicago, on the seventeenth day of April, 1863, and that after such deposition was taken down as aforesaid, the interrogatories and answers thereto as written down and read over to said witness, and that thereupon the same was signed and sworn to by the said deponent, before me, at the place and on the day and year last aforesaid.

In witness, whereof, I have hereunto set my hand and notarial seal this 17th day of April, 1863.

[SEAL.] SETH M. DUNNING,
Notary Public.

And upon the trial of said issue it was stated by plaintiff's counsel, that on the third day of January, 1862, the plaintiff commenced a suit upon the above, mentioned contract against the said defendant,
51 in the superior court of the city Chicago, county of Cook, and State of Illinois; and that in that suit an issue was joined between the said parties, and that said cause was tried in said superior court on the twentieth day of April, 1863, and a verdict and judgment rendered in favor of the plaintiff, and that thereafter, said cause (by the appeal of the said defendant) was removed to the court of Illinois, by which last named court the said judgment of said superior court, as reversed in September, 1864, on the ground that the action had been prematurely bought; and that a proscedendo from said supreme court was sent down in said cause, and filed in said superior court on the twenty-seventh day of March, 1865; and, also, that said cause was discontinued.

The above, mentioned depositions were read in evidence under an agreement betweeen the attorneys of the said plaintiff and the said
52 defendant, that the same and each of them might be used as evidence with the same effect as though the same had been taken in this cause in the circuit court of the United States for the northern district of Illinois; the foregoing is all the evidence introduced on the trial of the said issue.

And thereupon, the said judge charged the jury upon the law of the case, and amongst other things said to the jury, as the cash payment had not been made and no claim made for the other pay't, either in the season of navigation of 1861 or in the spring of 1862, [that they had nothing to do with the question of quantity or value of iron; the written contract, read in evidence by the plaintiff, being a contract to pay to the plaintiff on or by the thirty-first day of May, in the year of our Lord eighteen hundred and sixty-two, the sum of eight hundred and twenty-five dollars, either in money or in Lake Superior pig iron, at twenty-six dollars per ton, with interest on that sum, at
53 the rate of six per cent. per annum, from the first day of December, 1861, whichever the defendant might elect, and the plaintiff is, therefore, only entitled to recover this sum of eight hundred and twenty-five dollars and interest thereon, at the rate of six per cent. per annum, computed from the first day of December,

pay two hundred and fifty dollars in cash, which said sum was then paid, and he also gave two notes, the amounts of which I do not remember, nor the time they were to run. No bill of sale was given at that time. No security was given for the payment of those notes, except that in case he, McCulloch, should be unable to meet the payment of said notes, he was to deliver said machine to Mr. Vaughan in as good condition as it was at that time, natural ware excepted.

Cross-examination by pl'ff's att'y.

1st c. int. Was this contract in writing?

Answer. It was not.

2d c. int. Was there anything said between McCulloch and Vaughan in regard to Vaughan's refunding to McCulloch any of the $250, which McCulloch paid in cash, or any part of the money that he might pay on the notes, in case the machine should be redelivered to Vaughan.

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Answer. I have seen this morning an indorsement of $150 on the notes, in two sums, one of $120, Oct. 2nd, 1861, and $30 in February, 1861.

4th c. int. Do you know whether, under this contract, this machine was ever delivered to McCulloch by Vaughan?

Answer. It was then in McCulloch's possession. No formal delivery was ever made to my knowledge.

EDWIN L. HALL.

Subscribed and sworn to, before me, this 17th of April, 1863.

S. M. DUNNING,
Notary Public.

The above deposition is taken by the agreement of parties, and may be read on trial of the cause, subject to all legal objections to its competency.

JAS. L. STARK, Jr.,
Att'y for Def't.
E. L. SMITH,
Att'y for Pl'ff.
By B. D. McGRUDER.

April, 17, 1863.

STATE OF ILLINOIS,
Cook County, City of Chicago:

I, Seth M. Dunning, a notary public, in and for the city of
50 Chicago, in the county of Cook and State aforesaid, do hereby certify that Edwin L. Hall, whose name is subscribed to the foregoing deposition, was by me, as such notary public, sworn as a

witness in this suit, between the said plaintiff and defendant, that he would testify the truth so far as he should be interrogated concerning the same; that the said deposition was taken at my office in the city of Chicago, on the seventeenth day of April, 1863, and that after such deposition was taken down as aforesaid, the interrogatories and answers thereto as written down and read over to said witness, and that thereupon the same was signed and sworn to by the said deponent, before me, at the place and on the day and year last aforesaid.

In witness, whereof, I have hereunto set my hand and notarial seal this 17th day of April, 1863.

[SEAL.] SETH M. DUNNING,
Notary Public.

And upon the trial of said issue it was stated by plaintiff's counsel, that on the third day of January, 1862, the plaintiff commenced a suit upon the above, mentioned contract against the said defendant,
51 in the superior court of the city Chicago, county of Cook, and State of Illinois; and that in that suit an issue was joined between the said parties, and that said cause was tried in said superior court on the twentieth day of April, 1863, and a verdict and judgment rendered in favor of the plaintiff, and that thereafter, said cause (by the appeal of the said defendant) was removed to the court of Illinois, by which last named court the said judgment of said superior court, as reversed in September, 1864, on the ground that the action had been prematurely bought; and that a proscedendo from said supreme court was sent down in said cause, and filed in said superior court on the twenty-seventh day of March, 1865; and, also, that said cause was discontinued.

The above, mentioned depositions were read in evidence under an agreement betweeen the attorneys of the said plaintiff and the said
52 defendant, that the same and each of them might be used as evidence with the same effect as though the same had been taken in this cause in the circuit court of the United States for the northern district of Illinois; the foregoing is all the evidence introduced on the trial of the said issue.

And thereupon, the said judge charged the jury upon the law of the case, and amongst other things said to the jury, as the cash payment had not been made and no claim made for the other pay't, either in the season of navigation of 1861 or in the spring of 1862, [that they had nothing to do with the question of quantity or value of iron; the written contract, read in evidence by the plaintiff, being a contract to pay to the plaintiff on or by the thirty-first day of May, in the year of our Lord eighteen hundred and sixty-two, the sum of eight hundred and twenty-five dollars, either in money or in Lake Superior pig iron, at twenty-six dollars per ton, with interest on that sum, at
53 the rate of six per cent. per annum, from the first day of December, 1861, whichever the defendant might elect, and the plaintiff is, therefore, only entitled to recover this sum of eight hundred and twenty-five dollars and interest thereon, at the rate of six per cent. per annum, computed from the first day of December,

eighteen hundred and sixty-one up to this time, in addition to the one hundred and fifty dollars expressed in the contract to be paid in cash.

You will allow the plaintiff interest on this sum also, at the rate of six per cent., computed from the fifteenth day of July, 1861.] To the giving of which last-mentioned instruction, contained in brackets so as aforesaid, in charge to the said jury, the said plaintiff, by his said counsel, did then and there except.

And thereupon, on the instructions so as aforesaid given in charge to the said jury, a verdict for the said plaintiff was returned into court by the said jury for the sum of ten hundred and thirty-eight dollars and thirty-five cents.

54 And because none of the matters aforesaid appear by the record of the verdict aforesaid, the said plaintiff, by his said counsel, did then and there propose his aforesaid exception to the opinions, rulings, charges as aforesaid, and requested the said judge to sign and seal this bill of exceptions containing the matters aforesaid, according to the form of the statute in such case made and provided, and according to the course and practice of the said court, and thereupon, said request was and is complied with, and this bill of exceptions is allowed, signed, and sealed by the judge aforesaid, and the same is made a part of the record in said cause.

[SEAL.] THOMAS DRUMMOND.

Endorsed: Filed June 9th, 1865. Wm. H. Bradley.

55 On this day, to wit, the 7th day of May, A. D. 1867, came said plaintiff, by his attorney, and filed in said clerk's office his appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

United States of America, circuit court of the United States for the eighth circuit and northern district of Illinois.

JOHN R. PARSONS
vs.
CHARLES T. HARVEY. } In error.

Know all men by these presents, that we, John R. Parsons of the city of Chicago, Cook county, and State of Illinois, and Thomas Crouch, of Chicago, Cook county, and State of Illinois, are held and firmly bound unto Charles T. Harvey, above named, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said Charles T. Harvey, his executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors,

56 and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of April, A. D. 1867.

Whereas, the above named John R. Parsons hath prosecuted a writ of error to the Supreme Court of the United States to reverse the

judgment rendered in the above-entitled cause by the circuit court of the United States for the eighth circuit and northern district of Illinois;

Now, therefore, the condition of this obligation is such, that if the above-named John R. Parsons shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be, and remain in full force and virtue.

JOHN R. PARSONS. [SEAL.]
THOS. CROUCH. [SEAL.]

Sealed and delivered in the presence of—
E. JAMESON.

Approved.

THOMAS DRUMMOND.

Endorsed: Filed May 7th, 1867. Wm. H. Bradley, cl'k.

57 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court, in the cause wherein John R. Parsons is plaintiff, and Charles S. Harvey is defendant, as the same appears of record remaining in my custody.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court, at my office in the city of Chicago, in the district aforesaid, this seventh day of May, A. D. eighteen hundred and sixty-seven, and of our independence the ninety-first year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[U. S. revenue stamp 5 cts.]

$21 55 dollars paid for this record by Mr. Jameson, June, 18,'67.
W. H. BRADLEY, *Clk.*

58 CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court before you, between John R. Parsons, plaintiff, and Charles S. Harvey, defendant, a manifest error hath happened, to the great damage of the said John R. Parsons, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause
59 further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the eighty-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Endorsed: Circuit court U. S., Nor. Dist. Ills. John R. Parsons *vs.* Charles T. Harvey. Writ of error.

60 UNITED STATES OF AMERICA, *ss:*

To Charles T. Harvey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the eighth circuit and northern district of Illinois, wherein John R. Parsons is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness this 30th day of April, A. D. 1867.

THOMAS DRUMMOND.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Egbert Jamieson, being duly sworn, deposes and says: that on the 6th day of May, 1867, he personally served a true copy of the foregoing and above citation on James L. Stark, the attorney of the
61 said Charles T. Harvey, defendant in error, by handing to and leaving the same with the said Stark.

EGBERT JAMIESON.

Sworn to and subscribed before me, this 7th day of May, 1867.

WM. H. BRADLEY, *Cl'k.*

Endorsed: U. S. cir. court. John R. Parsons *vs.* Charles T. Harvey. Citation.

62 Supreme Court of the United States of America, of the December term, A. D. 1867.

JOHN R. PARSONS, plaintiff in error,
vs.
CHARLES T. HARVEY, defendant in error.

Error to the circuit court of the United States for the northern district of Illinois.

Assignment of errors.

And afterwards, to wit: on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States of America, comes the said John R. Parsons, by Matt. H. Carpenter, his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1st. The court erred in charging the jury, "that they had
63 nothing to do with the question of quantity or value of iron; the written contract, read in evidence by the plaintiff; being a contract to pay to the plaintiff, on or by the thirty-first day of May, in the year of our Lord eighteen hundred and sixty-two, the sum of eight hundred and twenty-five dollars, either in money or Lake Superior pig iron, at twenty-six dollars per ton, with interest on that sum at the rate of six per cent. per annum, from the first day of December, 1861, whichever the defendant might elect, and the plaintiff is, therefore, only entitled to recover this sum of eight hundred and twenty-five dollars and interest thereon, at the rate of six per cent. per annum, computed from the first day of December, eighteen hundred and sixty-one up to this time, in addition to the one hundred and fifty dollars expressed in the contract to be paid in cash.

"You will allow the plaintiff interest on this sum also, at the rate of six per cent., computed from the fifteenth day of July, 1861."

64 And the said John R. Parsons prays that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and for naught held, and that he may be restored to all things which he has lost by reason of said judgment.

By his attorney:

MATT. H. CARPENTER.

Endorsed: Supreme Court U. S., 1867, Dec. term. No. 250. Parsons *vs.* Harvey. Ass't of errors. Filed 25 June, 1867.

O

Supreme Court of the United States,

DECEMBER TERM, A. D. 1867.

JOHN R. PARSONS, - - PLAINTIFF IN ERROR,

VS.

CHARLES T. HARVEY, DEFENDANT IN ERROR.

ARGUMENT OF J. H. KNOWLTON.

Beach & Barnard, Brief Printers, 122 & 124 Clark St., Chicago.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

DECEMBER TERM, A. D. 1867.

JOHN R. PARSONS, - - PLAINTIFF IN ERROR,

VS.

CHARLES T. HARVEY, DEFENDANT IN ERROR.

ARGUMENT OF J H. KNOWLTON.

CHICAGO:
BEACH & BARNARD, STEAM PRINTERS.
1867.

ARGUMENT.

This was an action of assumpsit, brought by the plaintiff in error against the defendant in error, in the Circuit Court of the United States for the Northern District of Illinois.

The plaintiff claimed damages in the sum of four thousand dollars, for the non-payment of one hundred and fifty dollars, payable in money on the 15th day of July, 1861, and for the value of a fraction more than thirty-two tons of Lake Superior pig iron, by the defendant contracted to be delivered in Chicago during the season of 1861, or in the spring of 1862.

These several causes of action were stated in different counts of the declaration.

The cause was tried on the eighth day of June, 1865. At that time this kind of iron was worth in the Chicago market, fifty dollars per ton, and on the thirty-first day of May, 1862, it was worth thirty dollars per ton. On the third day of April of this same year, it was worth seventy dollars per ton.

On this day, and before this action was commenced, the plaintiff, in the city of Chicago, demanded of the defendant so much of this Lake Superior pig iron as $825 would pay for, at twenty-six dollars per ton. The defendant refused to deliver the iron. These facts were proved. (See printed record, page 10.) The plaintiff on the trial, also read in evidence, an instrument in writing, in the words and figures following, that is to say:

" CHICAGO, July 15, 1861.

" CHAS. T. HARVEY:

" Bo't of J. R. Parsons, 1 Fairbank & Wilmarth
" Sawing Machine, d'lv'd on board, at Chicago, for $975. A
" guarantee to be in all respects as good as a new machine, and in
" perfect order. Terms of payment—cash $150; *balance payable*

" in Lake Superior pig iron, d'lv'd in Chicago during this season, " at $26 per ton, or if not *paid in iron this season*, at option of " seller, the *purchase money* to be on interest from Dec. 1, *until* " *iron is* d'lv'd next spring. The machine to be tried before 1st of " September, and can be returned to seller within that time by " forfeiture of the cash payment, and no further claim will exist, " if machine prove unsatisfactory.

" J. R. PARSONS."

The defendant pleaded non-assumpsit, and the pendency of a prior action for the same cause in the Superior Court of Chicago, but it being objected that this plea was inadmissible after pleading non-assumpsit, the same was withdrawn, and on the trial the plaintiff admitted that such action was commenced in the winter of 1862, in which action he recovered judgment, and that Harvey being dissatisfied, appealed from the judgment of the Superior to the Supreme Court of Illinois, where the judgment was reversed, on the ground that the action was *prematurely brought*. That the cause had been remitted from the Supreme to the Superior Court, and that the action had been discontinued. (Printed record, page 19.) For this judgment of reversal, and the construction of the contract, *vide Harvey* v. *Parsons*, 36 Ill., 147.

The plaintiff recovered a verdict and judgment for ($1,038.35) ten hundred thirty-eight dollars and thirty-five cents.

To reverse that judgment, this writ of error is prosecuted:

The court charged the jury " That they had nothing to do with " the question of quantity or value of iron; the written contract, " read in evidence by the plaintiff, being a contract to pay to the " plaintiff, on or by the thirty-first day of May, in the year of our " Lord eighteen hundred and sixty-two, the sum of eight hundred " and twenty-five dollars, either in money or Lake Superior pig " iron, at twenty-six dollars per ton, with interest on that sum at " the rate of six *per cent. per annum*, from the first day of De- " cember, 1861, *whichever the defendant might elect*, and the plain- " tiff is, therefore, *only* entitled to recover this sum of eight hun-

" dred and twenty-five dollars, and interest thereon at the rate of " six *per cent. per annum*, computed from the first day of Decem- " ber, eighteen hundred and sixty-one, up to this time, in addition " to the one hundred and fifty dollars expressed in the contract, to " be paid in cash."

The plaintiff excepted to this instruction.

This charge is assigned for error.

If the agreement between the plaintiff and defendant was a contract to pay $825.00 in money, *or in iron* at $26 per ton, *whichever* the defendant might choose within the time specified, then the charge to the jury was correct; otherwise the charge was erroneous, and the judgment should be reversed.

To hold that this contract is in the alternative, is to declare that an instrument means what it *does not* read, and *does not* mean what it does read. The Court in charging the jury, put into the instrument by construction, the words " *either*," " *or*," and " whichever the defendant might elect"; that is, " *whichever Harvey might elect.*"

It is to be noticed that the instrument or contract read in evidence, is signed by the plaintiff, and not by Harvey the defendant.

It is a mere bill of sale by Parsons to Harvey, of one Sawing Machine at the price of nine hundred and seventy-five dollars—containing the terms and conditions of sale—how, within what time, and in *what commodities* payment for that machine should be made.

When Harvey received that Sawing Machine, on the terms and conditions stated in that bill of sale, he took it subject to the stipulations therein contained, and he impliedly, at least, agreed to comply therewith. He could not receive the machine and bill without.

By the charge of the Court, the whole purchase price of $975.00 is payable in money, *unless* iron was worth in the spring of 1862,

less than twenty-six dollars per ton, and then he could compel Parsons to take so much iron as eight hundred and twenty-five dollars would buy at twenty-six dollars per ton; so that if iron had been worth only ten dollars per ton, Parsons must lose sixteen twenty-sixths of eight hundred and twenty-five dollars, and the interest thereon from December 1, 1861.

Such a contract is clearly one that is "*fast and loose.*" Its similitude is the jug with a handle only on one side, and no handle at all. Now, we claim that nothing can be more just than that Parsons, who had to take iron at twenty-six dollars, in case it was worth *only* ten dollars per ton, is, or should be, the gainer in case iron was worth more than twenty-six dollars per ton.

We have just as much right to interpolate the contract, so that it shall read that Harvey shall either pay eight hundred and twenty-five dollars in money, or in pig iron at twenty-six dollars per ton, by the 31st day of May, 1862, which ever Parsons should elect, as we have to say that it was optional with Harvey whether he would pay eight hundred and twenty-five dollars in money or in pig iron at twenty-six dollars *per ton.* To say either, is to say that the contract does not mean what the language imports. If Harvey had this right of *election*, when, or within what time, and how was he to make that election known? Could he let the month of May, 1862, pass without notice to Parsons that he had elected to pay in money, or that he had elected to pay in iron at the price of twenty-six dollars per ton, and afterwards have compelled Parsons to have taken iron? Or could he have given notice to Parsons of the 1st day of May, 1862, that he had elected to pay in iron, at the stated price, and after that, and on the last day of that month, have tendered Parsons in money, eight hundred and twenty-five dollars, with six per cent. interest from the first day of the preceding December, in discharge of the contract? If not, (which we assume,) then there was no right of election in the defendant, as stated in the charge to the jury.

It seems anomolous that parties may, upon one side, make an agreement of sale, and on the other of payment, part in *one com-*

modity and the balance in another, and that the contract means, or that the parties *intended*, that the whole should be *payable* in only one of the named commodities; or that the whole should be paid in *one* of the specified articles, if the debtor found it to his own interest, and against the interest of the creditor, to refuse one commodity and pay in the other, and then not pay at all; and when sued for a breach of his contract, that the law should sanction his conduct, and preclude the creditor from recovering such sum as will indemnify him for the default of his debtor.

It would seem, however, that this is precisely what was done in the case at bar. The transaction between the parties was a plain one.

Parsons sold, and Harvey bought, a sawing machine. The purchase price was nine hundred and seventy-five dollars. Of this purchase price Harvey agreed to pay one hundred and fifty dollars *in cash*, and eight hundred and twenty-five dollars in Lake Superior pig iron, at twenty-six dollars per ton; and that he would deliver it at Chicago during the season of 1861; or if he did not during that season deliver the iron, (not deliver the iron or pay eight hundred and twenty-five dollars in money,) that *then* the purchase money for the iron—eight hundred and twenty-five dollars—(which had been paid to Harvey in the sawing machine,) should draw interest from December 1st, 1861, *until Harvey should deliver* the iron the following spring—not until he should pay eight hundred and twenty-five dollars in money, but until he should deliver the iron during the approaching spring.

Here it is seen that special provision is made for the delivery of the iron in the season of navigation, whether delivered in 1861 or in the spring of 1862, so that no inconvenience should be encountered by Harvey in getting the iron from the place of manufacture, or from scarcity during the season of non-navigation.

With such caution evinced, can it be that this was not a contract of sale, and for the delivery of iron absolutely?

Why talk about the purchase money of the iron being on interest, if Parsons had not purchased and paid for iron, and Harvey had not sold iron to Parsons? And why make such special provision about the delivery of the iron, either in 1861 or the spring of 1862, as Parsons might elect, but at fartherest to be delivered by or on the 31st day of May, 1862? And does not Harvey admit that, by the acceptance of the sawing machine, he had been paid for so much iron as eight hundred and twenty-five dollars would buy at twenty-six dollars per ton?

Harvey agrees that if *the iron is not* delivered during the season of 1861, that the purchase price, (eight hundred and twenty-five dollars,) *should*, from the 1st day of December, 1861, be on interest *until* the iron should be delivered the following spring. The iron must be delivered, or the eight hundred and fifty dollars money must commence to draw interest on the 1st day of December. So that, had Harvey tendered eight hundred and twenty-five dollars in money to Parsons on the 1st day of November, 1861, Parsons might properly have refused to receive it, and have replied: "The contract is, that if the iron is not delivered this sea-
" son, the eight hundred and twenty-five dollars purchase money
" must be on interest from the 1st day of December next, until
" you deliver to me the iron next spring. You cannot get rid of
" this *interest stipulation* without delivering iron; and *offering to*
" *pay money will not do it.* I insist upon your complying with
" the contract."

Clearly, the law must have sustained such a reply, as containing the duty of Harvey and the right of Parsons under the contract. If (as we now see) Harvey could not have complied with his undertaking in the contract, by offering eight hundred and twenty-five dollars on the 1st day of November, 1861, then the contract was one for iron, and the quantity was thirty-two and seven-thirteenths tons, in the spring of 1862. Being a contract to deliver iron, it could no more be discharged by a tender of eight hundred and twenty-five dollars and interest in the spring of 1862, than it could in November, 1861, by a tender of the eight hundred and

twenty-five dollars in money without interest. Hence it follows, that the value of the stipulated *quantity* of iron is the measure of damages to which Parsons is entitled; and of consequence, eight hundred and twenty-five dollars, with interest from the 1st day of December, 1861, is not Parsons' true measure of damages, as stated in the charge of the Court.

But again. Had Harvey, on the 1st day of May, 1862, tendered to Parsons in money, eight hundred and twenty-five dollars and interest thereon from December 1st, 1861, in discharge, and as a performance by Harvey, Parsons could have refused to receive it, and could, with the law in his favor, have replied: "The contract provides that the eight hundred and twenty-five "dollars purchase money shall be on interest *until* you deliver "the iron to me at Chicago, this spring, and this spring has got "thirty more days in it for interest to accumulate; and you can "only put a stop to that accumulation by *delivering the iron to* "*me.* I require you to comply with the terms of the contract." The law says to Harvey: "*Parsons is right.* He may refuse "everything but Lake Superior pig iron *until the spring is gone*, "and if you do not deliver the iron during the time that Parsons "has the right to refuse everything but iron, you have, on your "part, violated the contract, and after that time has elapsed, you "will have to pay what the *quantity* of iron which you have "agreed to deliver is worth; and that quantity is so much, at "twenty-six dollars per ton, as eight hundred and twenty-five dol-"lars and interest thereon at six per cent. from the 1st day of De-"cember, 1861, will pay for. You must know, Mr. Harvey, that "the whole period of time by the contract allowed you for per-"formance, is allowed to Mr. Parsons to refuse receiving from you "everything but iron. Therefore, deliver iron within the time "allowed for so doing, or meet the consequences which the law "entails." Harvey not being able to gainsay this plain and obvious interpretation of the contract, must submit to the behests of law. Is it not true that if A. agrees to pay B. one hundred dollars, on a day and at a place specified *in pork*, at ten dollars per barrel, that he must *pay in pork* at the price stipulated, and that

B. is bound to take the quantity of pork that the one hundred dollars would pay for at ten dollars per barrel? And is it not obvious that the parties chose rather to fix the price of the commodity in which payment is to be made, than take the risk of the market on the stipulated delivery day? And that A. was unwilling to make the trade unless B. would take pork; and not only take pork, but take it at a price then fixed; and that B. would not receive pork unless the price was fixed, so as to get such quantity as he knew he should have use for, or could sell to fill some prior contract which he had made, and which would be none of A.'s business?

If these questions must be answered in the affirmative, then it is obvious that the contract is, on the one side for the delivery, and on the other for the receiving, *ten* barrels of pork in *full payment* for an *existing* debt of one hundred dollars. This being so, it is clear that there is no *option* in either party that payment shall be made in money *or* in pork. There is no agreement to pay, nor to receive payment, in anything *but pork*, and the quantity is fixed by the parties in the contract.

Both chose to rely on their foresight, or business judgment, as to the quantity to be received, rather than risk what the price of pork per barrel would be at the time specified for performance. Their minds met *first* on the fact that payment should be made, not in money, but *in pork;* and second, their minds met on the fact of the *quantity* of pork to make the payment with. B. took the risk of losing in case pork would *not* sell for ten dollars per barrel, and having taken that risk, he is entitled to the benefit in case it would sell for more on the day specified for payment. A. wished, and by the contract acquired the right to pay the debt with *ten* barrels of pork, in case it would not sell for more than *five* dollars per barrel on the day fixed for its delivery; and for this acquired benefit, he ought to lose, in case it would on that day sell for more than ten dollars. As the contract made was for the absolute delivery of a *fixed quantity* of pork, the pork must be delivered, in order to comply with the agreement between the parties, unless the courts will put other words into the contract,

and thus make an agreement that will please *one* of the parties better than the one he entered into, and which will not suit the *other* so well as the agreement which he made. To hold that the meaning or legal effect of a contract to pay one hundred dollars in flour at ten dollars per barrel, is the same as a contract to pay one hundred dollars in money, *or in flour* at ten dollars per barrel, is to hold that an agreement to do a specified thing *absolutely*, is a contract in the *alternative*, and that the promissor may do the specified thing, or another thing not specified. Such construction violates that important and time-honored rule of interpretation which requires that *every word* shall be taken to mean something and have effect given to it, if possible. By adopting the converse of this rule, the words "in money or," in the last supposed contract, mean nothing at all. These words must be rejected, or held meaningless, or the contract containing them does not mean the same thing as a contract which has them not.

A contract may be, in its terms, absolute, in the alternative, or conditional. But each is different from the others. Whether absolute, conditional or in the alternative, depends upon the language employed by the parties. It is not the office of the law to metamorphose the acts of parties into something different from what those acts bespeak in unmistakeable language.

A contract to pay one hundred dollars in a specified chattel, at a place and on a day named, without price specified, may well be discharged in money, or in the chattel named, because the effect upon the debtor and creditor is the same, whichever is given as payment. No price being fixed, the debtor to pay in the chattel must deliver enough to pay the hundred dollars at the market price or value of the commodity; and the creditor has contracted for nothing more, and by sale he can get his hundred dollars and no more. So that a hundred dollars paid in money takes the same amount, in fact, from the debtor, and the same amount is received by the creditor, as though that sum were paid in the commodity which would sell for that sum. But such would not be the result under a contract to pay one hundred dollars in flour, at ten dollars per barrel, unless the market price per barrel was ten dollars at

the time of delivery. The result, therefore, depending upon the price being less or more than ten dollars, shows that such a contract is different from one where one hundred dollars is to paid in a specified commodity, without price specified, because the result *may be* different. There is, then, all the difference between "may be" and "cannot be."

There can be no well grounded doubt that a contract to pay one hundred dollars in flour at ten dollars per barrel, is, in legal effect, the same as a contract to pay ten barrels of flour at ten dollars per barrel. To hold that the former is like the latter, is to give effect to every word in the contract, and to hold that the former is a contract in any sense to pay one hendred dollars in money, is to strike out the words " in flour at ten dollars per barrel," or to make it a contract to pay one hundred dollars in money, or in flour at ten dollars per barrel, is to insert the word " or," and make a contract in the alternative, instead of the absolute contract which it is, when effect is given to every word contained in the instrument. It would be an abominable rule, that words might be erased or put into a contract, as the Court might choose, even if the so doing was to relieve a party from a hard contract. The rule once established for *that* purpose alone, would be to transfer to the courts the power to make contracts.

The consequence would be, that parties would be encouraged to disregard their contracts, and rely upon the courts to change them, so as to better suit their present interest. When such a rule becomes established as law, the prominent feature in jurisprudence will be the flood-wood of uncertainty. In the case of *Price* v. *Justrobe*, Harper's Carolina Reports, 111, two chattel notes of different phraseology, was held to be of the same legal effect. They were as follows:

CHARLESTON, 8th November, 1814.

" Sixty days after date, I promise to deliver Mr. Justrobe, or " order, such number of barrels of new rice as will amount to the " sum of two hundred dollars value, received this day, at one dol- " lar per *cwt.*

" T. W. PRICE."

The other read:

"Sixty days after date, I promise to deliver Mr. Justrobe, twen-
"ty-five barrels of rice, at one dollar and one quarter per cwt.
"28th December, 1814.

"T. W. PRICE."

The jury, under the charge of the court, returned a verdict for the value of the rice, at a higher rate than that specified in the contract.

The court say that "it is impossible, by the most subtle con-
"struction, to give to the notes on which this action is partially
"founded, *any other legal effect* than that of contracts for the deliv-
"ery of rice, mentioned in them, on the days stated, the price
"mentioned being nothing more than the *consideration on which*
"*they were founded;* and there is no principle better established,
"or more universally acted upon, than that the measure of dam-
"ages is the value of the thing on the day on which it should be
"delivered. To which there is no legal objection to superadd by
"way of damages, also the interest which has since accrued *on the*
"*amount.*" The point that the measure of damages was differ-ent on such contracts, where, on one—payment had been made in advance, and on the other, payment was to be made when the commodity was delivered, does not appear to have engaged the attention of either the counsel or the Court. But this distinction has been taken in other cases, of which we quote the following:

Random v. *Barton*, 4 Texas, 289.

Cannon v. *Folsom*, 2 Iowa, Clarke, 101.

In this case the Court say: "When the price of the commodity
"contracted to be delivered, has been paid prior to the time for
"delivery, a somewhat different rule obtains, and it has been re-
"peatedly held, that in such case the plaintiff is not confined in
"his recovery to the difference between the contract and market
"price on the day of delivery; but he may recover the highest
"market price between *the day for delivery and the time suit is*
"*brought*, provided the plaintiff does not unreasonably delay the
"institution of his suit."

Chief Justice MARSHALL appears to have been of the same opinion in—

Shephard v. *Hampton*, 3 Wheaton, 200.
Clark v. *Pinney*, 7 Cowen, 681.
Pinney v. *Gleason*, 5 Cowen, 152, 411.
West v. *Beach*, 3 Cowen, 82.
Davenport v. *Wells*, 3 Iowa (Clarke), 242.
Cole v. *Ross*, 9 B. Monroe, (Ky.,) 393.
Mallox v. *Craig*, 2 Bibb., (Ky.,) 584.
West v. *Pritchard*, 19 Conn., and cases there cited, 212.

This last is a carefully considered case.

Kortright v. *Buffalo Com. Bank*, 20 Wend., 93.
Kortright v. *Buffalo Com. Bank*, 22 Wend., 366.
Shephard v. *Johnson*, 2 East, 211.
McArthur v. *Seaforth*, 2 Taunton, 257.
Harrison v. *Harrison*, 1 C. & P., 412.
Downs v. *Back*, 1 Starkie, 318.
Dunlop v. *Higgins*, 1 H. L. Cases, 381, 403.
McDonald v. *Hodge*, 5 Hayward, Tenn., 85.
Edgar v. *Boies*, 11 S. & R., *per* Gibson, 445.
Menson v. *Philips*, Addison, 346.
Wilson v. *George*, 10 N. H., 445.

In 2 Greenleaf on Evidence, it is said, "But if the vendor has "already paid the *price in advance*, he may recover *the highest* "*price of such goods*, in the same place, at any time between the "stipulated day of delivery and the time of trial." In 3 Parsons on Contracts, 205, 5 Ed., we find substantially the same. "But if he paid the price down, or in advance, then he is entitled "*not only* to their increase in value *at the time* he brings his ac- "tion, but to any increase which may have taken place at any in- "termediate period between the purchase and the action, *even if* "the value *had fallen* again before the action."

We think the authorities cited abundantly establish that the plaintiff in error was entitled to recover the value of thirty-two

and seven-thirteenths tons of iron, on the day this action was commenced, namely—April 3d, 1865. That value was seventy dollars per ton, equal to two thousand two hundred and seventy-seven dollars and sixty-nine cents. The plaintiff in error was guilty of no delay. The defendant in error not only made no offer to pay, but delayed payment by appeal of the first suit, and when, after that was decided in his favor, the iron was demanded of him, he utterly refuses to deliver it, and fails to offer so much as one dollar in money. It will be seen in this case, cited in 36 Illinois, that the Supreme Court consider the contract in question one for the delivery of iron. That such is its legal effect, will appear from the following cases, above cited, namely:

Pinney v. *Gleason*, 5 Cowen, 152–411.
Coe v. *Ross*, 8 B. Monroe, (Ky.) 393.
Mattox v. *Craig*, 2 Bibb. (Ky.) 584.
Clark v. *Pinney*, 7 Cowen, 681.
Price v. *Justrobe*, Harper's Carolina R. 111.

However, none of the contracts in any of these cases contain words showing so unmistakably an intent of an agreement to absolutely pay in chattels as is apparent in the case at bar.

We think it clear, upon reason and upon authority, that the Court below erred in its construction of the contract, and that for that error the judgment should be reversed.

MATT. H. CARPENTER,
Attorney for Plaintiff in Error.

J. H. KNOWLTON, *of Counsel.*